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SEP 15 1981
ALEXANDER L. STEVAS,
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No. 80-2195

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In opposing our petition, respondent does not attempt to rebut our demonstration (Pet. 11-14) that claims of "prosecutorial vindictiveness," asserted after a defendant exercises a procedural right in the pretrial stage of a criminal prosecution, have arisen with ever increasing frequency and have produced an outpouring of lower court rulings dismissing criminal charges contained in superseding indictments and informations. The fact that such claims arise with great frequency, and that their correct and efficient resolution is essential to the effective enforcement of the criminal law, could not seriously be contested. Nor has respondent offered any common-sense explanation why the court of appeals in this case disregarded the express finding of the district court that the government had "adequately dispelled any appearance of vindictiveness" (Pet. App. 22a).

Respondent argues, however, that the decision of the court of appeals should not be further reviewed because there is a way in which it can be reconciled with prior rulings of this Court and other federal circuits. In particular, respondent argues, based largely on district Judge Green's opinion for the panel in *United States* v. *Andrews*, 612 F. 2d 235, 240-245 (1979), vacated, 633 F. 2d 449 (6th Cir. 1980) (en banc), that it was wholly proper for the Fourth Circuit to disregard the district court's finding that the superseding charge in this case was not brought vindictively because the charge was "substituted" for, rather than "added" to, the charges alleged in the original misdemeanor complaint.[1]

The rationale adduced by respondent, however, provides a wholly inadequate basis for deciding the legal issues presented by the petition and fails as well to reconcile the conflicting decisions of the various courts of appeals. It remains clear that other circuits would have upheld respondent's convictions and that the intervention of this Court is necessary to clarify this important and increasingly confused area of the law.

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[1] Under Judge Green's formulation, a "substitution" occurs whenever a new charge increases the potential severity of the punishment to which a defendant is exposed for the same criminal conduct (612 F. 2d at 244). An "addition" occurs whenever more numerous charges are filed based on distinct offenses arising from the same series of events underlying the original charge (*id.* at 245). Under Judge Green's analysis, the filing of a "substituted" charge constitutes a prima facie case of prosecutorial vindictiveness that may only be overcome by showing the existence of intervening circumstances arising subsequent to preferral of the original charge, that first made it possible to file the more serious charge (*id.* at 244). By contrast, if the filing of "added" charges is involved, any allegation of vindictiveness is "subject to rebuttal by the prosecution offering evidence of facts which reasonably explain or justify the action taken and negate any inference of vindictiveness in fact" (*id.* at 245). As noted below, the Sixth Circuit, sitting en banc, rejected Judge Green's analysis.

1. In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978), this Court reiterated that due process violations lie "not in the possibility that a defendant might be deterred from the exercise of a legal right * * *, but rather in the danger that the State might be retaliating against the accused" by filing more severe or numerous charges after the defendant has exercised a constitutional or statutory right. The dichotomy between "added" and "substituted" charges, suggested by respondent, does nothing to advance the proper analysis of this fundamental issue.

In determining whether there is "a realistic likelihood" (*Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974)) or a "real threat" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973)) of "actual vindictiveness" (*id.* at 26), it is of little consequence whether the means chosen by a prosecutor to "punish a pesky defendant" (*Hardwick* v. *Doolittle*, 558 F. 2d 292, 301 (5th Cir. 1977)) entail the addition of more numerous charges or the substitution of a more severe charge. Both charging devices have an equal capacity to "up the ante," and both may be as readily employed by a prosecutor to inflict retribution. As Judge Keith correctly observed in his panel dissent in *Andrews* (612 F. 2d at 256):

> The facts of this case illustrate how tenuous Judge Green's distinctions really are. Because the prosecutor only added a conspiracy count, he allows the government to advance explanations such as inadvertence and neglect to rebut a prima facie case of vindictiveness. Had the prosecutor substituted a more severe charge, Judge Green would bar it. I do not think that this * * * distinction is warranted. * * * In this case, whether the government substituted or added the charge is not very important.

In practical terms, defendants will often subjectively perceive—justifiably or not—that the filing of substituted charges resulted from retaliatory motives. And in the vast

majority of cases the government will be unable to demonstrate that it was "impossible" to file the substituted charges in the first instance when those charges arise out of the same nucleus of operative facts as the original charge. Because of this, application of Judge Green's rule, which rests on the artificial distinction between "added" and "substituted" charges, would lead to wholly arbitrary assessments of prosecutorial vindictiveness in a large number of cases.

By focusing entirely on the defendant's subjective apprehension of vindictiveness when a substituted charge is brought (612 F. 2d at 244), Judge Green would eliminate the requirement that there be an objective and realistic danger of vindictiveness in this kind of case. See *Bordenkircher* v. *Hayes, supra*, 434 U.S. at 363; *Blackledge* v. *Perry, supra*, 417 U.S. at 27; *Chaffin* v. *Stynchcombe, supra*, 412 U.S. at 26, 28; see also the decision of the Sixth Circuit sitting en banc in *United States* v. *Andrews, supra*, 633 F. 2d at 454-455. Moreover, by limiting the acceptable explanation for the substituted charge solely to intervening circumstances, Judge Green's rule would prevent the government from "affirmatively" dispelling any appearance of vindictiveness (*North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969)) based upon "all the circumstances" in a case (*United States* v. *Griffin*, 617 F. 2d 1342, 1347 (9th Cir. 1980)). In effect, there would be few substituted charges that would ever be sustained under Judge Green's approach. Nothing in this Court's decisions suggests that such an analysis is required by the Due Process Clause.

2. We know of no circuit that applies the rule advocated by respondent. Although the court below has—improperly in our view—adopted a per se rule, it has not done so based on the distinction advanced by respondent. Rather, the Fourth Circuit limits the government's explanation to intervening circumstances whenever "more serious" or

"increased" charges are filed. See Pet. App. 6a, 10a. In the court's words (*id.* at 6a): "the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges * * * where there [was] no showing that the charges could not have been brought before defendant made his election for a jury trial."

The two circuits that have referred to respondent's "substituted/added" charge distinction (the Fifth and the Sixth) have done so only as part of a multi-faceted balancing test that requires attention to all of the facts of record. Neither of these circuits has suggested that the distinction is determinative. Thus, in its en banc decision in *Andrews*, the Sixth Circuit followed a two-step analysis. At the threshold was an inquiry whether, as an objective matter, there existed a realistic likelihood of vindictiveness, based both on the prosecutor's "stake" in deterring the exercise of the legal right and on whether the new charges were "added" or "substituted" (633 F. 2d at 454). The court emphasized, however, that "there is no per se rule here" (*ibid.*). Moreover, even if a weighing of such factors establishes a "realistic likelihood" of vindictiveness, and regardless whether the new charges are "added" or "substituted," the government is afforded broad latitude to "rebut" this finding with "objective, on-the-record explanations" of the kind offered in this case (*id.* at 456).

The Fifth Circuit has adopted a similar test, balancing a defendant's due process interest in asserting a particular right against the prosecutor's interest in bringing increased or more serious charges. See *Jackson* v. *Walker*, 585 F. 2d 139, 144-145 (5th Cir. 1978); *Hardwick* v. *Doolittle*, 558 F. 2d 292, 301 (5th Cir. 1977). Considered in this threshold analysis are both the stage of the proceeding at which the new charges are brought and whether the charges are additions or substitutions (*ibid.*). However, the Fifth Circuit,

like the Sixth but unlike the Fourth Circuit in the instant case, allows broad latitude in rebutting any realistic appearance of vindictiveness: "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained." *Hardwick* v. *Doolittle, supra*, 558 F. 2d at 301; accord, *Miracle* v. *Estelle*, 595 F. 2d 1269, 1277 & n.14 (5th Cir. 1979).

3. Contrary to the impression conveyed by the brief in opposition, no other circuit would limit the government's explanation for the new charge in this case to a demonstration of facts that were unavailable when the original charges were preferred. As we have shown above, both the Fifth and Sixth Circuits would allow the prosecutor broad latitude in dispelling any appearance of vindictiveness. The Ninth Circuit similarly allows the filing of more serious or additional charges to be justified by "independent reasons"—reasons different from "intervening circumstances." See, *e.g.*, *United States* v. *Robison*, 644 F. 2d 1270, 1272 (9th Cir. 1981).[2] And, in *United States* v. *Anderson*, 514 F. 2d 583, 588 (7th Cir. 1975), and *United States* v. *Ricard*, 563 F. 2d 45, 48 (2d Cir. 1977), the courts of appeals have afforded the government broad latitude to provide nonvindictive explanations for the new charges. There can be little genuine doubt that these courts would accept the explanation offered by the prosecutor in this case, particularly when the

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[2]Some panels of the Ninth Circuit, however, have dismissed criminal charges on expansive "vindictiveness" theories that cannot be squared with the decisions of this Court or with other Ninth Circuit decisions. Those rulings place unwarranted obstacles in the path of prosecutors who find it appropriate to alter charges against the accused after he exercises a procedural right. See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 646 F. 2d 384 (9th Cir. 1981); *United States* v. *Currie*, No. 80-1835 (9th Cir. Aug. 17, 1981). Due to the serious confusion created by *Currie* and *Hollywood Motor Car Co.*, the government has requested rehearing with a suggestion for rehearing en banc in each of those cases.

district court affirmatively has found a complete absence of vindictiveness (Pet. App. 22a-23a)—a finding that was accepted on appeal (*id.* at 4a).

Of greatest importance, as pointed out in our petition (Pet. 20-21), other courts of appeals would credit the prosecutor's explanation for increased charges based on the inexperience of the original prosecutor and her lack of authority to seek a felony indictment (see Pet. 4-5). Indeed, the other circuits have held that a "successor prosecutor" may take "a different approach to prosecutorial duty" and obtain increased charges without offending the Due Process Clause. See *Jackson* v. *Walker, supra*, 585 F. 2d at 148-149 & n.20; *United States* v. *Ricard, supra*, 563 F. 2d at 48; *Hardwick* v. *Doolittle, supra*, 558 F. 2d at 301; *Miracle* v. *Estelle, supra*, 592 F. 2d at 1277 n.14; *United States* v. *Andrews, supra*, 633 F. 2d at 456.

In sum, the Fourth Circuit has adopted a rigid per se rule for resolving vindictiveness claims that—contrary to respondent's suggestion (Br. in Opp. 14)—cannot be reconciled with the flexible standards adopted by the other circuits. If left undisturbed, this decision will continue to result in the dismissal of indictments and the vacation of convictions in circumstances in which any appearance of vindictiveness on the prosecutor's part has been completely dispelled. That result agrees neither with due process principles nor the decisions of this Court.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1981

DOJ-1981-09